No. 13,863

IN THE

United States Court of Appeals

For the Ninth Circuit

JOAO SIMOES BARREIRO,
Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,
Appellee.

APPELLANT'S PETITION FOR A REHEARING BY THE COURT EN BANC (OR IF A REHEARING BE DENIED, FOR A STAY OF THE MANDATE).

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To the Honorable Clifton Matthews, the Honorable Homer T. Bone, and the Honorable Richard H. Chambers, United States Circuit Judges:

The appellant in the above entitled cause respectfully petitions Your Honors for a rehearing before the entire Court, deeming that the question involved upon this appeal is of such importance as to warrant a hearing *en banc.*

The grounds upon which appellant submits that a rehearing should be granted are as follows:

I.

SINCE THIS COURT HAS MODIFIED THE JUDGMENT OF THE DISTRICT COURT AND HAS AFFIRMED IT UPON THE SOLE GROUND OF THE FAILURE OF THE COMPLAINT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, THE ALLEGATIONS OF THE COMPLAINT MUST BE TREATED AS TRUE.

The gist of the decision of Your Honors is set forth in Division II of the opinion written by His Honor, Judge Matthews. The language of that portion of the opinion is as follows:

> "No alien was eligible for suspension of deportation under Sec. 155(c) unless he was eligible for naturalization or was ineligible for naturalization solely by reason of his race. It did not appear from the complaint that appellant was eligible for naturalization or was ineligible for naturalization solely by reason of his race. Instead, it appeared from the complaint that on June 10, 1943, appellant applied to be, and was, relieved from liability for training and service under the Selective Training and Service Act of 1940, as amended, and was thereby debarred from becoming a citizen of the United States. Thus it appeared from the complaint that appellant was ineligible for naturalization, not by reason of his race, but by reason of the application above mentioned, and was therefore ineligible for suspension of deportation."

In the last paragraph but one of the opinion it is stated: "We conclude that the complaint failed to state a claim upon which relief could be granted."

Since Your Honors have modified the judgment of the District Court so as to dismiss the action for

such alleged failure, we submit that the decision of this Court must stand or fall upon the sufficiency of the complaint. In other words, if the complaint is good as against a motion to dismiss upon the grounds stated, which is the equivalent of a general demurrer under the old practice, the judgment of this Court cannot stand.

We submit that the complaint states sufficient grounds for relief in the form of a declaratory judgment.

II.

THE SUFFICIENCY OF THE COMPLAINT FOR DECLARATORY RELIEF.

An action for declaratory relief is obviously for the purpose of obtaining a declaration of the rights of the parties; the present action is not brought for the purpose of **compelling** the Attorney General to suspend deportation, but merely for the purpose of obtaining a judgment that the plaintiff is eligible for such suspension,—that he is proper subject for the exercise of the power conferred upon the Attorney General by the Dies Act in the exercise of his discretion. In such an action it is unnecessary to set forth evidentiary matters; it is enough to plead facts showing that an **actual controversy exists.** (*Tolle v. Struve,* 124 C.A. 263, 12 Pac. (2d) 61; *Northwestern Casualty Co. v. Legge,* 91 C.A. (2d) 19, 204 Pac. (2d) 106; *Andrews v. W. K. Co.,* 35 C.A. (2d) 41, 94 Pac. (2d)

604; *Maguire v. Hibernia Savings and Loan Society,* 23 Cal. (2d) 719, 146 Pac. (2d) 673, 151 A.L.R. 1062.)

It may be said in passing that practically from the beginning of the deportation proceedings against plaintiff, more than eleven years ago, the Immigration Department has taken the position that petitioner was a person of good moral character, that his deportation would result in serious economic detriment to his wife and children, all of whom are citizens of the United States, but that the claim of exemption from military service, once made, no matter in what circumstances or under what conditions, is irrevocable and cannot be withdrawn. The ultimate purpose of this action was to obtain a judgment that, since appellant's claim of exemption was filed under the advice of his local board, after he had repeatedly and without success attempted to enlist in the Armed Forces of the United States, being rejected each time upon the sole ground that he was an alien, he had a right to withdraw the claim of exemption, based as it was upon the improvident advice given to him "by the highest authority to which he could turn." (*Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729.)

This observation is sufficient to dispose of the last paragraph of Part I of the opinion, and also of Part III.

III.

THE OPINION OF THIS COURT HAS FAILED TO PASS UPON IMPORTANT QUESTIONS RAISED IN APPELLANT'S OPENING BRIEF.

These may be summarized as follows:

(a) This Court has failed to even mention the admitted fact that appellant attempted to withdraw his claim for exemption.

In appellant's opening brief, commencing at page 22, we set forth *in haec verba* the order of May 28, 1945, made by the Department of Justice, in which appellant's application for suspension of deportation was ordered deferred for sixty days for the purpose of giving appellant an "opportunity to **withdraw his application for exemption** from the draft."

We further set forth the letter addressed by plaintiff to the Immigration and Naturalization Service of the Department of Justice and to his local Selective Service Board on April 27, 1945, withdrawing his claim of exemption. Further set forth is a communication from appellant's local board, dated April 28, 1945, acknowledging receipt of the letter last referred to and concluding with the direction, "If it is still your desire to apply for voluntary induction, please return the two copies of D.S.S. Form 165 which were given to you at the time you were last in the office."

We repeat that Your Honors, at least so far as appears from the opinion, have wholly failed to take into consideration the appellant's withdrawal of his claim of exemption.

(b) The attempts of appellant to enlist in the armed forces of the United States are likewise ignored in the opinion.

These are set forth *in extenso* in appellant's opening brief and are enumerated in his complaint. (Appellant's Opening Brief, p. 10 et seq.)

From these allegations of the complaint which, as we have heretofore stated, must be taken as true for present purposes, it appears that plaintiff, prior to the improvident filing of the claim of exemption, had endeavored to enlist in the United States Navy and that he subsequently endeavored to enlist in every branch of the service. He was rejected in some cases upon the ground that he was an alien and in others on account of his age. It is likewise alleged in the complaint (Appellant's Opening Brief, p. 10), which must also be taken as true, that plaintiff did not knowingly or wilfully claim exemption from service in the Armed Forces, and that he requested the classification solely because he was erroneously and improvidently advised so to do.

This fact is utterly ignored in the opinion of Your Honors.

IV.

THE OPINION OF THIS COURT FAILS TO FOLLOW THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES WHICH HOLD THAT A CLAIM OF EXEMPTION IMPROVIDENTLY MADE MAY BE WITHDRAWN.

In arguing this matter in Appellant's Opening Brief (pp. 30-39), we contended that the Court below, in the exercise of its equity powers, had the right to relieve the plaintiff from a mistake of either law or fact in conformity with established equitable principles. (*Houston v. Northern Pacific R. R. Co.,* 231 U.S. 181, 34 S.Ct. 113, 58 L.Ed. 176; *Winget v. Rockwood,* 69 Fed. (2d) 326.)

We showed further, with citation of authorities, that appellant could not justly be debarred from pressing his application for suspension of deportation by reason of his improvident claim, which he was induced to file by his own draft board. To say that he could not be relieved against the consequences of this claim for any reason whatsoever, is, we submit, the pronouncement of a rule contrary to the immemorial principles of equity jurisprudence.

> **"Nothing less than an intelligent waiver is required by elementary fairness."** (*Moser v. United States,* supra.)

In that behalf we also cited *Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433; *Delgadilla v. Carmichael,* 332 U.S. 338, 68 S.Ct. 10, 92 L.Ed. 17.

We submit that this Honorable Court has not only applied to the statute the letter that killeth rather

than the spirit that giveth life, but that the opinion is clearly contra to the rule pronounced by the Supreme Court of the United States.

It is noteworthy that this Honorable Court has not only refrained from all mention of the numerous decisions cited by appellant, but that not a single decision of any Court, *nisi prius* or appellate, is cited anywhere in the opinion.

We submit that the injustice and cruelty of a statutory interpretation which drives the husband and father of an American wife and American children into exile in a foreign land should not be upheld unless the precise terms of the statute clearly require it. "Deportation can be the equivalent of banishment or exile."

* * * * * * *

"The stakes are indeed high and momentous for an alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent upon circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized." (*Delgadilla v. Carmichael,* supra.)

As is well said in *Michado v. McGrath,* 183 Fed. (2d) 706, Barreiro "was entitled to have the 'opportunity to make an intelligent selection' between being subject to the draft on the one hand, and being exempt but losing a right to become a citizen on the other." We submit that the high authority of these decisions has been wholly ignored and disregarded by Your Honors.

CONCLUSION.

Wherefore the appellant respectfully prays Your Honors for an order granting a rehearing of this cause in which the stakes for him are so high, before the entire Court, pursuant to the provisions of Rule 23 of this Court; or, in the event that a rehearing be denied, for an order staying the mandate of this Court for a reasonable time to enable appellant to apply to the Supreme Court of the United States for a writ of *certiorari* to review the judgment of this Court.

Dated, San Francisco, California,
September 20, 1954.

JOSEPH A. BROWN,
Attorney for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
September 20, 1954.

Joseph A. Brown,
Attorney for Appellant and Petitioner.